

DEPARTMENT OF ECONOMIC DEVELOPMENT

NO. 433

21 May 2021



**MEMORANDUM OF UNDERSTANDING
("MOU")**

Entered into between

**THE COMPETITION COMMISSION OF SOUTH AFRICA
("the Commission")**

**a juristic person established in terms of section 19 of the
Competition Act No. 89 of 1998 as amended, ("the Competition Act"), herein duly
represented by Mr. Tembinkosi Bonakele, in his capacity as the Commissioner of
the Competition Commission of South Africa**

And

**THE COUNCIL FOR MEDICAL SCHEMES
(Hereinafter referred to as "the Council ")**

**a juristic person established in terms of section 3 of the Medical Schemes Act No.
131 of 1998 ("the Medical Schemes Act"), herein duly represented by Dr. Sipho
Kabane in his capacity as the Registrar of the Council for Medical Schemes**


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PREAMBLE


The Commission is mandated to, *inter alia*, investigate and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, as well as conducting market inquiries.

The Council is established in terms of the Medical Schemes Act 131 of 1998, (the "Medical Schemes Act") to regulate the registration and control of activities of medical schemes, to provide for measures or the co-ordination of medical schemes and incidental matters. The Council's mandate among others is to protect the interests of the beneficiaries of medical schemes at all times; To control and coordinate the functioning of medical schemes in a manner that is complementary with the national health policy; Make recommendations to the Minister of Health on criteria for the measurement of quality and outcomes of the relevant health services provided by medical schemes; Investigate complaints and settle disputes in relation to the affairs of medical schemes; Collect and disseminate information about private health care; Advise the Minister on any matter concerning medical schemes.

The Commission and the Council have concurrent jurisdiction in respect of competition matters as set out in section 63 of the Medical Schemes Act 131 of 1998, (the "Medical Schemes Act") and the Commission and the Council recognise that their respective mandates are mutually reinforcing and should thus encourage the optimal utilisation of the most effective remedies available between the two institutions, as the case may be.

This MOU shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the two statutory bodies in the medical scheme industry. The review shall take into account prevailing legal precedents, legislative amendments, the promulgation of regulations, and policy reviews, as the case may be.

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Therefore the Commission and the Council agree as follows:

1. INTERPRETATION

In the interpretation of any terminology used in this MOU, any word or expression to which a meaning is assigned in the Competition Act, Medical Schemes Act and its regulations has the meaning assigned to it unless otherwise specified.

2. OBJECT OF THE MOU

- 2.1. This MOU is entered into to establish the manner in which the Commission and the Council will interact with each other to enable them to, *inter alia*:
- 2.1.1. Effectively coordinate the exercise of concurrent jurisdiction powers when making decisions in relation to merger transactions and complaints involving medical schemes, medical scheme administrators and brokers;
 - 2.1.2. apply a consistent interpretation and application of the principles of competition when exercising their powers and their respective functions in terms of their enabling legislation in relation to medical schemes;
 - 2.1.3. timeously provide each other with the necessary information in respect of the investigation of anti-competitive practices, complaints, regulation of mergers and acquisitions, as well as research developments or studies within the medical schemes industry as well as on aspects of the Commission's Health Market Inquiry recommendations that relate to the Council.

3. PRINCIPLES OF CO-OPERATION

- 3.1. In order to achieve the purposes of this MOU, the Parties have adopted and will comply with the principles of co-operation set out below:
- 3.1.1. the Parties will cooperate in mutual trust and good faith;

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- 3.1.2. the Parties will assist and support each other in respect of agreed-upon services and commitments between them in terms of this MOU;
 - 3.1.3. the Parties will inform each other of, and consult each other on matters of common interest; and
 - 3.1.4. the Parties will avail to each other the necessary support for the successful performance of the tasks and programmes envisaged in this MOU.
- 3.2. This MOU does not affect the independence of the Commission and the Council in respect of fulfilling their mandate in terms of the respective legislation with which they must comply.

4. LEGISLATIVE FRAMEWORK

- 4.1. Section 21(1) (h) read with sections 3(1A)(b) and 82 (1) and (2) of the Competition Act 89 of 1998 as amended ("the Competition Act"), state that the Commission is responsible to negotiate agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act;
- 4.2. Section 8 (c) of the Medical Schemes Act empowers the Council to conclude an agreement with any person including the State or any other Institution in support of CMS's mandate.
- 4.3. Section 41 (h) of the South African Constitution obliges all spheres of Government to co-operate with one another in mutual trust and good faith through:
- 4.3.1. Informing one another of, and consulting one another on matters of mutual interests;
 - 4.3.2. Coordinating their actions and legislation with one another;
 - 4.3.3. Supporting and assisting one another; and
 - 4.3.4. Avoiding legal proceedings against one another.


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- 4.4. Section 41 (1) (g) provides that all spheres of government and all organs of state within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the functional jurisdiction of another.

5. COMPLAINTS

- 5.1. Where a complaint is lodged regarding practice or conduct in respect of which the Commission and the Council have concurrent jurisdiction, the following process will be followed to the extent possible:
- 5.1.1. The regulator that receives the complaint ("the Recipient Regulator") may notify the other regulator in terms of this Agreement;
- 5.1.2. The Commission and Council may consult with each other in respect of the complaint;
- 5.1.3. The Recipient Regulator may notify the complainant(s) that the Commission and Council will consult each other in terms of this MOU;
- 5.1.4. In consulting each other in respect of the complaint, the parties must have regard to the principle that –
- 5.1.4.1. the Commission is to exercise primary authority to detect and investigate alleged prohibited practices to give effect to the Competition Act; and
- 5.1.4.2. the Council must promote competition in the private health care sector in terms of the Medical Schemes Act and its Regulations.
- 5.1.4.3. The Recipient Regulator may, in its discretion, advise the complainant(s) as soon as reasonably possible of the outcome of the consultation between the Commission and Council;
- 5.1.4.4. The Recipient Regulator may give the complainant(s) further directions regarding the investigation of the complaint in question;



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- 5.1.4.5. If the matter is dealt with by the Commission, representatives from the Council may, at the request of the Commission, participate in the matter through *inter alia* attending meetings when required; providing inputs during the case investigation and making representations at the Competition Tribunal hearing if necessary.
- 5.1.4.6. If the matter is dealt with by the Council, representatives from the Commission may, at the request of the Council, participate in the matter through *inter alia* attending meetings, providing inputs during the case investigation and making representations at the Councils' proceedings if necessary.
- 5.1.4.7. If it is decided in the consultation process, contemplated above, that the Council will deal with the matter, the Commission may, in its discretion, issue a notice of non-referral to the complainant, in terms of Section 50(2)(b) of the Competition Act, and in instances where the Commission is the Recipient Regulator, the complainant(s) shall not be precluded from referring the complaint directly to the Competition Tribunal in terms of section 51(1) of the Competition Act.
- 5.2. Nothing in the consultation procedures contemplated herein shall detract from the jurisdiction of the Commission or the jurisdiction of the Council to receive and deal with complaints in terms of their enabling statutes as they deem fit, or preclude the public from lodging complaints with both the Commission and the Council concurrently.
- 5.3. Where a complaint relates to practice or conduct where either the Commission or the Council has jurisdiction, but there is no concurrent jurisdiction, the following shall apply:
- 5.3.1. The complaint may be lodged with the regulator that has jurisdiction;

- 5.3.2. If upon receiving a complaint, the Recipient Regulator is of a view that it does not have jurisdiction over the matter, the Recipient Regulator may advise the complainant(s) accordingly and recommend that the complainant refer the complaint to the relevant regulator.
- 5.3.3. If the Council is the Recipient Regulator that has jurisdiction, it may in its discretion liaise and consult with the Commission where the input of the Commission is sought with respect to relevant considerations of competition issues to take into account;
- 5.3.4. The Commission shall be entitled to do likewise when it is the Recipient Regulator with jurisdiction, and may, in its discretion liaise and consult with the Council where the input of the Council is sought on regulatory issues subject to the jurisdiction of the Council;
- 5.3.5. The decision by the Commission and the Council to consult each other shall be discretionary and voluntary, and either party shall be entitled, with or without consultation, to make its independent decision in respect of the complaint in terms of its enabling legislation;
- 5.4. When the Commission and the Council consult each other, as contemplated in this MOU, they shall do so at no cost to each other.

6. MERGER TRANSACTIONS

- 6.1. Where a merger transaction ("transaction") requires the approval of both the Commission and the Council, such as one involving the amalgamation of the business of medical schemes or the transfer of any business from a medical scheme to any other medical scheme the Commission and the Council shall consider the transaction in accordance with their enabling legislation. The merging parties shall submit applications containing the required information to both the Commission (in accordance with the Competition Act) and the Council (in accordance with section 63 of the Medical Schemes Act) for their respective consideration.



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- 6.2. The Commission and the Council shall make independent determinations based on the criteria and mandates of their respective legislative and regulatory frameworks. In arriving at these determinations, the Commission and the Council may consult each other in as far as competition matters are concerned.
- 6.3. When consulting each other in terms of sub-clause 6.2 above, the Commission and the Council must have regard to the principle that:
- 6.3.1. the Commission is to exercise primary authority in the review of mergers in any industry, including the medical scheme industry, as required to give effect to the Competition Act; and
- 6.3.2. the Council is to exercise primary authority to establish conditions within the medical scheme industry as required to give effect to its applicable statutes.
- 6.4. Where a transaction requires the approval of either the Commission or the Council, but not of both, the Council and the Commission may consult each other to ensure the consistent application of competition principles and/or regulatory issues to the transaction in question.

7. HEALTH MARKET INQUIRY (“HMI”)


- 7.1. The Commission and the Council may consult and co-operate with each other, regarding health policy matters relating to competition in the medical schemes industry and the South African healthcare sector; in addition to case-related investigations (enforcement and mergers and acquisitions).
- 7.2. The Commission and the Council may provide mutual support regarding the implementation of the key recommendations of the HMI that impact the role of the Council. This includes issues pertaining to:
- 7.2.1. Development of the single base package for medical schemes, aligned with the review of Prescribed Minimum Benefits (PMBs);

- 7.2.2. Review of regulations relating to Trustees, Principal Officers and Administrators to improve Medical Scheme accountability;
- 7.2.3. Multi-lateral tariff negotiation framework for PMBs and Reference Price List for non-PMBs;
- 7.2.4. Designated Service Provider (DSP) agreements that may raise competition issues;
- 7.2.5. Quality and outcomes monitoring; and
- 7.2.6. Any other matters requiring cooperation in relation to the HMI recommendations.

8. ADVICE

- 8.1. The Council may request and receive advice from the Commission, in respect of regulatory aspects falling under the competency of the Commission.
- 8.2. The Commission may request and receive advice from the Council in respect of regulatory aspects falling under the competency of the Council.
- 8.3. All requests for advice or information by either regulatory authority will be submitted in writing.
- 8.4. The regulatory authority seeking advice or information must indicate a deadline before or upon which such advice or information should be given by the other regulatory authority.
- 8.5. The Commission and the Council may consult each other under this MOU at no cost to each other.
- 8.6. Should either regulatory authority consider a matter before it, in terms of a timeline, such regulatory authority would share with the other, its expected process, and the other regulatory authority would cooperate to the best of its ability, towards achieving the targets set out in the project timelines.

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- 8.7. The Commission and the Council may, upon request from each other, participate in each other's proceedings in an advisory capacity;

9. ESTABLISHMENT OF THE JOINT WORKING COMMITTEE

- 9.1. A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the Council, as nominated by the respective regulators, shall be established pursuant to this MOU and shall function for the duration of this MOU.
- 9.2. The functions of the Committee shall be:
- 9.2.1. To manage and facilitate co-operation and consultation in respect of matters dealt with by each regulator in terms of this MOU;
 - 9.2.2. To propose, when necessary, any amendment of or supplementation to this MOU;
 - 9.2.3. To advise management of both the Commission and the Council on issues affecting the medical schemes industry and competition in South Africa as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to the following:
 - 9.2.3.1. Types of conduct or transactions affected by both the Competition Act and the Medical Schemes Act and its regulations in respect of which concurrent jurisdiction is to be exercised by the two regulators;
 - 9.2.3.2. International approaches to issues of overlap concerning jurisdiction between the Commission and the Council, as the case may be;
 - 9.2.3.3. Amendments to the relevant or applicable statutes that may be necessary from time to time; and
 - 9.2.3.4. Policy considerations and any other related matter.

- 9.3. The Committee shall meet regularly, but no less than once per quarter, to ensure both regulatory authorities are aware of developments in areas of common interest.

10. INSTITUTIONAL CONTACT PERSONS

For purposes of this MOU:

- 10.1. The Divisional Manager: Advocacy will be the main contact person at the Commission.
- 10.2. The General Manager of Stakeholder Relations will be the main contact person at the Council.
- 10.3. Should the regulatory authorities have to exchange information, because of discussions at the Committee, the processes set out in this MOU shall be followed.

11. EXCHANGE OF INFORMATION

- 11.1. Subject to paragraph 12 below, the Commission and the Council may exchange information as may be necessary to give effect to this MOU.
- 11.2. The Commission and the Council may inform each other of any decision/judgement that either of them has taken in respect of the anti-competitive practice or conduct involving the same respondent, in so far as it pertains to competition matters.
- 11.3. The Commission and Council may exchange information on identified areas of concurrent jurisdiction, and provide for the protection of confidential information

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12. CONFIDENTIALITY

- 12.1. Any information shared by the Commission and the Council pursuant to this MOU must be used only for lawful purposes in matters of concurrent jurisdiction.
- 12.2. Any request made by either of the parties for confidential information in possession of the other shall be dealt with in accordance with the procedures set out in the parties' respective enabling legislation or policies or procedures.
- 12.3. The party providing confidential information pursuant to this MOU shall clearly indicate what information is identified as confidential to the requesting party.
- 12.4. The parties shall ensure that confidential information accordingly disclosed to them remains confidential and is not placed in the public domain through any negligent or wilful conduct on its behalf.
- 12.5. To the extent permitted by law, the Commission and the Council shall hold confidential information received from each other pursuant to this MOU and shall not otherwise disclose such information except when required to do so by the law or an order of a Court or a Tribunal.
- 12.6. The Commission and the Council shall, before disclosing such confidential information or a part thereof when required to do so by the law or an order of a Court or a Tribunal, notify each other of the law or an order of a Court or Tribunal requiring such disclosure.
- 12.7. The sharing of confidential information, in accordance with this MOU, relies on the assurances given in 12.1; 12.2; 12.3; 12.4 and 12.5 above and shall not constitute a waiver of any legally recognizable grounds for refusing disclosure of information.

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- 12.8. Where confidential information is disclosed either by the Commission or the Council in contravention of this MOU, such disclosing party shall be solely liable in law for such disclosure.
- 12.9. Any of the parties may in its discretion decline a request for confidential information made in terms of this MOU.

13. GENERAL PROVISIONS

- 13.1. The provision of, or request for information under this MOU may be denied:
- 13.1.1. where compliance would require the Commission or the Council to act in a manner that would violate the applicable law;
 - 13.1.2. under circumstances where there is an imminent risk to national security; or
 - 13.1.3. when compliance with a request or provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.
- 13.2. No provision of this MOU shall give rise to a right on the part of any person, entity or organ of the state other than the Commission and the Council, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this MOU.
- 13.3. The provisions set forth under clauses 11 and 12 must prevail with respect to any information provided or actions taken under this MOU prior to its termination.

14. NON-VARIATION

- 14.1. This MOU constitutes the whole of the agreement between the parties relating to the subject matter hereof.



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14.2. No amendment or consensual cancellation of this MOU or any term of this MOU, including this clause shall be binding unless recorded in a written document signed by duly authorised representatives of both regulators.

15. TERMINATION OF PREVIOUS AGREEMENTS

This MOU terminates existing agreements entered into between the Commission and the Council.

16. EFFECTIVE DATE OF THE MOU

This MOU comes into force on the date on which it is last signed by the persons authorized to act on behalf of both the regulators.



17. DURATION OF THE MOU

This MOU must remain in force until it is amended or repealed by both regulators acting jointly.

18. REVIEW OF THE MOU

This MOU shall, on an ongoing basis, be reviewed to accommodate developments incidental to matters that require co-operation between the two regulators. The review shall take into account prevailing legal precedents, legislative amendments, the promulgation of regulations, and policy reviews, as the case may be.

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19. DISPUTE RESOLUTION

Should any dispute or difference arise between the two regulators with regard to interpretation and/or implementation of any one or more of the provisions of this MOU, such dispute or difference must be resolved in a manner other than through judicial or arbitration proceedings. In the event of such dispute, the representative of the respective entities as stated in clause 10 shall meet with the view of resolving the impasse between the entities.

20. DOMICILIUM CITANDI ET EXECUTANDI



The regulators choose the following addresses as their respective *domicilium citandi et executandi* for purposes of this MOU:

THE COMPETITION COMMISSION

The DTI Campus
Mulayo (Block C),
77 Meintjies Street,
Sunnyside,
Pretoria
CONTACT PERSON: Ms Khanyisa Qobo

THE COUNCIL FOR MEDICAL SCHEMES

Block A, Eco Glades 2 Office Park
420 Witch Hazel Avenue
Eco Park
Centurion
0157
CONTACT PERSON: Ms. Mmatsie Mpshane.



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THUS, DONE AND SIGNED IN PRETORIA ON THIS 25 DAY OF March 2021



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Mr. Tembinkosi Bonakele
Commissioner: Competition Commission SA

As witnesses:



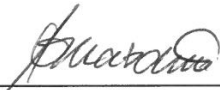
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Dr Sipho Kabane
Registrar: Council for Medical Schemes

As witnesses:

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